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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTSUNITED STATES OF AMERICA, )  
Plaintiff, )  
v. ) Criminal Action  
KINGSLEY R. CHIN, ADITYA HUMAD, ) No. 1:21-cr-10256-IT  
and SPINEFRONTIER, INC., ) Pages 1 to 68  
Defendants. )  
)BEFORE THE HONORABLE M. PAGE KELLEY  
UNITED STATES MAGISTRATE JUDGEFINAL STATUS CONFERENCE  
(Digital Recording)

September 13, 2023

John J. Moakley United States Courthouse  
One Courthouse Way  
Boston, Massachusetts 02210Linda Walsh, RPR, CRR  
Official Court Reporter  
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25 produced by computer-aided stenography.

## 1 P R O C E E D I N G S

2 THE COURT: Okay. Good afternoon, everyone.

3 MR. POLLACK: Good afternoon.

4 MR. DERUSHA: Good afternoon.

5 THE CLERK: Today is Wednesday, September 13th, 2023.

6 We are now on the record in criminal case number 21-10256,  
7 United States versus Chin, et al., the Honorable M. Page Kelley  
8 presiding.9 Will counsel please identify themselves for the  
10 record.11 MR. DERUSHA: Good afternoon, Your Honor. It's AUSA  
12 David Derusha for the United States, and with me are AUSAs  
13 Patrick Callahan, Chris Looney, and Abe George.

14 THE COURT: All right. Good afternoon.

15 MR. POLLACK: Good afternoon, Your Honor. Barry  
16 Pollack on behalf of Dr. Kingsley Chin and Spinefrontier, Inc.  
17 With me -- we're sharing a conference room and hopefully not  
18 getting any feedback on this with each other. We've muted  
19 one -- is Josh Solomon.20 THE COURT: Okay. I'm not getting any feedback so  
21 far. And good afternoon to you.22 MR. FICK: Good afternoon, Your Honor. William Fick  
23 and Daniel Marx on behalf of defendant Aditya Humad, who is  
24 also here on the Zoom.

25 THE COURT: All right. Good afternoon.

1                   MR. PABIAN: Your Honor, this is Michael Pabian here  
2 for intervenor Dr. Jason Montone.

3                   THE COURT: Okay. Good afternoon to you.

4                   MR. PABIAN: Good afternoon.

5                   THE COURT: Okay. I think that's everyone, right?

6                   All right. So we're here, first of all, for the final  
7 status conference, and I know you've been redirected to Judge  
8 Talwani. And given the outstanding motions, which I'm happy to  
9 hear argument on this afternoon, I thought we might continue  
10 the final status conference to one last date of Monday, October  
11 30th at 10:30 a.m., and I'm happy to hear the parties on the  
12 appropriateness of doing that.

13                  Okay. Hearing nothing, I don't know if that means  
14 it's not appropriate or appropriate, but anyway, I'm going to  
15 put this over to Monday, October 30th, at 10:30 for a -- go  
16 ahead.

17                  MR. CALLAHAN: Your Honor, Patrick Callahan for the  
18 United States. Just wondering, is there any chance that that  
19 could be in the afternoon? Only because I have an appearance  
20 that morning. If not, I'm sure my colleagues could handle it,  
21 but if it's possible, that would be great.

22                  THE COURT: No problem at all. And is 2:00 o'clock  
23 okay with everyone if we move it to then? Is that all right  
24 with you, sir?

25                  MR. CALLAHAN: That would be great for me, Judge

1 Kelley. Thank you.

2 THE COURT: All right. We'll say 2:00 o'clock.

3 All right. So -- and I'm going to exclude the time.

4 So we have two motions. Number 107, which is  
5 defendants' motion to compel the government to provide  
6 discovery, and then number 108, which is the government's  
7 motion to compel. And I'm happy to start with 107. And I know  
8 that Dr. Montone has asserted his privilege over certain of the  
9 emails and other communications with his attorneys on the  
10 phone. And I know you're here, and I accept your assertion of  
11 that privilege. And I don't know, does your lawyer want to be  
12 heard any further on that?

13 MR. PABIAN: Yeah, Your Honor. I can be brief. So in  
14 short, Dr. Montone decided to seek intervention in this matter  
15 last week, upon seeing some of the defendants' briefs which  
16 argued that the government could not raise privilege issues  
17 here; and essentially what we're doing is we're seeking  
18 intervention in the matter and notifying the Court that in the  
19 event these documents are held to be within the scope of the  
20 discovery or obligations of the government, contrary to the  
21 arguments the government has made, that we do intend to assert  
22 privilege. And we believe that the remedy in that situation  
23 would be a privilege log, just as Judge Talwani held in the  
24 Gibson case that the defendants rely heavily on.

25 THE COURT: Okay. Thank you very much. And so I

1 think I'll hear from defendants about the question of the  
2 government needing to search Mr. Monotone's phone.

3 MR. POLLACK: Thank you, Your Honor, I think I'll be  
4 taking the lead on this argument. And I think I'll lead in  
5 some of the issues about the motion to intervene rather than  
6 try to take that on first because I think some of what gets  
7 covered relates to that.

8 But I'll start by referring to *United States versus*  
9 *Gibson*, which the party seeking intervention seeks to  
10 characterize the holding as a remedy is a privilege log. It's  
11 actually far from that in how that case developed. And my firm  
12 represented the defendant that was seeking the material.

13 I think it's important to remember in that case it was  
14 actually a law firm server that was at issue which carried with  
15 it, I think largely, material that was irrelevant and would  
16 have many third parties claiming privilege who never took any  
17 voluntary act.

18 Here we've heard Dr. Montone turns over a phone for  
19 imaging, his counsel at the time, who is not counsel present  
20 here today, indicates at most the phrase "Please note. I'm the  
21 lawyer with regard to privilege." It contains no written  
22 agreement in response or anything that we've seen in the record  
23 that would set parameters or the sort of -- anything remotely  
24 like the sort of detailed protocol that appeared in the *Gibson*  
25 case to which the government and a law firm had agreed.

1           But I jump to the government's position because it  
2 starts even before remedy with the idea that despite holding  
3 and controlling the image of the phone, it's not in possession,  
4 custody, or control of that phone, and that just runs squarely  
5 against what not just Magistrate Judge Cabell had said but also  
6 Judge Talwani in that case, who said -- who adopted the  
7 Magistrate Judge's finding that holding it and controlling it  
8 is possession. You don't have to reach things like custody  
9 or -- but that that was enough to trigger the government's  
10 duties.

11           Now, jumping out from that opinion, once that ruling  
12 came, there was actually an agreement between the government  
13 and the defendant on how that would be searched, and efforts  
14 were actually made to craft something that would allow in that,  
15 I think, more unique circumstance of a law firm with many, many  
16 clients' materials on it on how to handle that. And the  
17 parties holding the privilege still did not have notice at that  
18 time. I don't think notice went out to every client that their  
19 materials had been turned over by their law firm to the  
20 government.

21           But here, the government, even more so than in *Gibson*,  
22 had notice of the *Gibson* ruling. They should know that when  
23 they take possession of items like this, and here they did so  
24 without a protocol, at most what they seem to have done -- we  
25 have an email from the government that somewhere around August

1 13th they informed Dr. Montone's counsel. I don't know if that  
2 was Mr. Pabian or the underlying counsel who was the conduit of  
3 information with the government during Dr. Montone's  
4 cooperation. But they told him that the material had been  
5 subject to a motion at that time. It had been requested for  
6 months earlier.

7 We don't know if that was conveyed by the government.  
8 Clearly there wasn't any kind of an agreement between the  
9 government to convey that information. As parties often do, if  
10 they turn something over to someone else, they let me know so I  
11 can object. This was just handed over to the cooperator saying  
12 here, but remember my name, please note, this is my name so  
13 that you can avoid privilege material, and again, no agreement.  
14 But that means that the intervenor has waited a month.

15 And the law is actually pretty clear. You don't just  
16 assert a privilege by saying I assert privilege or if you  
17 require me to, I'll assert privilege. A party has to make a  
18 timely objection and provide a privilege log, and we've  
19 provided case law. I don't think we have a full response to  
20 the motion to intervene, but we responded pretty quickly last  
21 night. And we've cited some of the case law in both this  
22 circuit and elsewhere that says it's not enough to make a vague  
23 reference, particularly whereas here we know that all of the  
24 material before -- I don't have the date in front of me, but I  
25 think it's in 2018, so late 2018 is what the charge of

1 obstruction runs through. I think it's December 2018. I don't  
2 know the exact date.

3                   But the material that predates that, to the extent  
4 there is communications with counsel, it wouldn't be with  
5 Mr. Pabian. We're certainly not looking for communications  
6 that have happened in the past few weeks or whatever it may  
7 have been with Mr. Pabian. We are not looking for those things  
8 that occurred in the past several months in preparing a  
9 response to that request but those things that happened while  
10 that -- while Dr. Montone, as he has admitted through pleading  
11 guilty, obstructed justice by providing false documents, we  
12 believe from what we've read, at least in part, his efforts  
13 were using counsel as a conduit. And I believe the copy was  
14 made shortly after that.

15                   We're talking about the plea is through December 2018.  
16 The copy I think is -- I think there's an email in January  
17 saying he was going to be in there sometime in 2019. So there  
18 wouldn't be many materials in the 2019 time frame. But we're  
19 talking about counsel getting used as a conduit. We cited case  
20 law about that. Obviously information is not privileged when  
21 it just reveals facts, not facts for the purpose of legal  
22 advice, scheduling information which can be relevant in this  
23 case, and I want to get into that as I talk about the *Brady*  
24 issues that permeate both of the categories of information that  
25 we seek in our motion to compel.

1           But, you know, there's obviously not a blanket claim  
2 and a privilege that can be everything that has my lawyer's  
3 name in it, which is what it says, "Please note. Here's my  
4 name and email address" is somehow privileged, which cried out,  
5 to the extent someone was trying to preserve privilege rights,  
6 for a privilege log here, but also a much more diligent effort  
7 to preserve the privilege rather than just gain points as a  
8 cooperator.

9           And let's face it, that's what's lurking here, right,  
10 is that Dr. Montone turned this over to help himself. He was  
11 seeking the affirmative benefit of making this information  
12 available without being that nuisance to the government that  
13 would insist on privilege through a detailed protocol agreement  
14 such as what appeared in *Gibson* where still -- Judge Talwani  
15 was not finished. I want to be clear, that even where it  
16 involved numerous other clients who had not yet had notice and  
17 had not yet been able to be heard that their information was  
18 sitting there. But anything that didn't make it on a log was  
19 getting turned over, and there was supposed to be a Part 2 to  
20 that.

21           And certainly the Part 2 here warrants being collapsed  
22 into Part 1 because there's been inadequate efforts to maintain  
23 the privilege. And there's so many categories, whether it's  
24 the use of the attorneys as the conduit, just facts, the crime  
25 fraud exception to the extent that these emails are furthering

1 information to the government, because anything that's about  
2 what's getting further to the government would affect the  
3 materiality of the obstruction of justice charge that -- to  
4 which Dr. Montone has pled guilty, and then scheduling type  
5 emails.

6 In addition, the Confrontation Clause, the Supreme  
7 Court has found with regard to each privilege, one at a time,  
8 that the Confrontation Clause overrides privilege and is  
9 important. So I'd say, Your Honor, if, to the extent there  
10 hasn't been a wholesale waiver by a choice, a strategic choice  
11 to benefit oneself by handing something over to the government  
12 with a note saying "Please note," not reaching an agreement  
13 that could protect the material, if that's not deemed a  
14 complete waiver, then all of this should be subject to an  
15 in-camera inspection.

16 I know we don't know the universe of these documents.  
17 I would suspect we're not talking about thousands of documents.  
18 We might be talking about dozens. The government would be in a  
19 better position or Mr. Pabian would be in a better position  
20 because this is an image, so his client would still have the  
21 original phone. So he should be aware of what he's asserting,  
22 which I wouldn't even call a genuine categorical assertion,  
23 right? It's categorical in the everything on the phone.

24 If it turns out you're thinking about turning this  
25 over, Your Honor, then I'm going to think about privilege some

1 more. It's not a categorical that says, hey, there's seven  
2 emails with background statements that are purely background  
3 that were given for my purposes as attorney. We're not seeing  
4 anything like that that can put this in context, but I do think  
5 that at the very least, and there's plenty of case law on this,  
6 an in-camera inspection is going to be necessary here in order  
7 to determine -- and this might be the time or it might be the  
8 time as I address the next category to talk about the scope of  
9 *Brady* material because we're talking about a witness who --  
10 actually, let me just double-check the date of this.

11 I guess he did enter his plea after the -- after  
12 the -- that's it. The grand jury in this case, in its deep  
13 wisdom, carefully considering all the evidence that the  
14 government put before it, charged the conspiracy to run through  
15 at least June 2019. And we know that that's just an  
16 approximate, right? Because it's that sort of at least in or  
17 about, and I think the "at least" means it could go further  
18 with named and unnamed conspirators.

19 As I'm going to get into, Your Honor, the defendants  
20 are facing criminal charges about all their activities through  
21 that date, and that's several years of the government  
22 interacting with named and unnamed conspirators -- alleged  
23 co-conspirators and witnesses which brings to the table a  
24 number of forms of *Brady* that we expect to see through these  
25 materials.

1           I think what I can do is sum this up now, and then  
2 when I talk about the joint investigation aspect, which is Part  
3 2 of our motion, I can apply it to that. But as --

4           THE COURT: So, can I just interrupt you for a second?  
5 So maybe I'll just ask what -- either the government or the  
6 witness, what is the scope of the information the government  
7 has, kind of temporally? How big a -- how much data did the  
8 witness hand over to the government?

9           MR. CALLAHAN: Your Honor, I'll handle this piece  
10 unless Mr. Pabian would like to go first.

11           MR. PABIAN: No, that's fine. I would just ask for a  
12 few brief minutes to respond with some of those arguments that  
13 were raised with respect to Dr. Montone.

14           THE COURT: Okay.

15           MR. PABIAN: If I could do that afterwards.

16           THE COURT: Okay.

17           MR. CALLAHAN: Just to talk about I guess the scope of  
18 what was turned over, Your Honor, Dr. Montone -- an extraction  
19 and image of his phone was turned over, and the only materials  
20 that were held back from that image being turned over were the  
21 attorney-to-client communications between Dr. Montone and his  
22 criminal defense attorneys at the time. Again, we're not  
23 calling them attorney-client privileged materials. We're  
24 calling them attorney-client communications because we were not  
25 given the consent by Dr. Montone to review those. He

1 explicitly carved that out, and he said, I'm giving you these  
2 names of my criminal defense attorneys for the ex -- and he  
3 says, quote, "For the purposes of protecting any  
4 attorney-client privileged text messages or emails on the cell  
5 phone." Those are the only things that we held back, Your  
6 Honor.

7 And just to be clear, the only thing we're talking  
8 about are one-on-one communications between the attorneys, at  
9 the time it was John Kelly and Brian Healy, his two defense  
10 attorneys, and Dr. Montone. And that's one of the reasons -- I  
11 just want to make sure we're focused on the right thing, Your  
12 Honor.

13 And the volume, I'm not exactly sure what it is  
14 because we haven't -- again, we haven't looked at it. I would  
15 suspect it's not in the thousands, exactly like Mr. Pollack has  
16 said. But to put it in context, what we've produced is, and  
17 what we produced early, is Dr. Montone's, you know, all the  
18 interview reports of Dr. Montone, Dr. Montone's signed plea  
19 agreement, his grand jury testimony, the exhibits attendant to  
20 his grand jury testimony, and the entire document production.

21 THE COURT: Okay. Sure. So I know you've been really  
22 liberal with the discovery, but just focusing for a minute on  
23 the information from the phone, what's the time span of the  
24 information on the phone? When does it start and when does it  
25 end?

1                   MR. CALLAHAN: I don't have a specific time when it  
2 starts, Your Honor. I know the date it was imaged, which we  
3 understand it was early February 2019.

4                   THE COURT: Okay. And when you say "we've handed over  
5 everything except the one-on-one communications with his  
6 criminal defense lawyers," does that mean you've given over the  
7 entire contents of his phone except for those?

8                   MR. CALLAHAN: Yes, Your Honor. So it's a Cellebrite  
9 report and a forensic report of what's on the phone. So we  
10 turned that over, and we said when we turned it over, Your  
11 Honor, and that was June 2022, I believe, we turned it over,  
12 and we explicitly called this out to make sure, you know,  
13 counsel knew what we were doing and what we felt we could turn  
14 over and what was in our possession, and that was everything  
15 but those communications that Dr. Montone had explicitly carved  
16 out from his consent.

17                  You know, going beyond that could have been a Fourth  
18 Amendment violation, Your Honor, and also, we're precluded from  
19 doing that. We're precluded from looking at the  
20 attorney-client communications, particularly when someone puts  
21 us on notice and says in here are my attorney-client  
22 communications with my defense counsel.

23                  THE COURT: Sure. So I understand that you had an  
24 agreement with Dr. Montone not to look at those things, but I  
25 do think, especially in light of the *Gibson* case, you're kind

1 of treading on very thin ice by taking the whole thing into  
2 your possession. I mean, I wonder if it wouldn't have been  
3 simpler for him to give it to you without the attorney-client  
4 communications in it. Because I do think it's kind of a  
5 fiction that you don't possess them now, and I think that's  
6 what Gibson stands for and Judge Talwani endorsed that idea.

7 MR. CALLAHAN: No, I --

8 THE COURT: Yeah, so I think they are in your  
9 possession. You agreed not to review them, but I think the way  
10 you agreed not to review his attorney-client communications  
11 doesn't guarantee that they're all privileged. I think that's  
12 the problem.

13 MR. CALLAHAN: Right. No, I understand --

14 THE COURT: You don't know because you didn't look at  
15 them.

16 MR. CALLAHAN: Right.

17 THE COURT: So one of the things I would like to know  
18 is how many of those communications are there, and if there's  
19 not a huge number of them, I will look at them *ex parte* and see  
20 if they contain *Brady* as best I can. I've done that in other  
21 cases, looked at things that -- myself, and I'll get some maybe  
22 *ex parte* communications from the defense concerning what they  
23 think would be helpful.

24 I think Attorney Pollack was about to go through those  
25 factors, but I'm happy to take a detailed *ex parte*

1 communication and -- but I don't know if there's -- I mean, I  
2 don't -- I don't know how many years of information you have.  
3 If it stops in 2019, I don't know when it starts, but I can't  
4 imagine he had thousands of communications with his lawyers.

5 MR. CALLAHAN: I would expect that's correct, Your  
6 Honor, and I don't want to waste the Court's time, but if I  
7 could have a word about Gibson --

8 THE COURT: Go right ahead.

9 MR. CALLAHAN: -- before we move on? And I  
10 understand. You know, I can take a hint.

11 As to *Gibson*, though, I think it is important to keep  
12 a few things in mind about *Gibson* and the holding and what's at  
13 issue. And in *Gibson*, if you look at the transcripts, what  
14 they were looking for in *Gibson*, if you look at the transcript  
15 of that hearing, Judge Cabell -- and it's docket 75 and it's at  
16 page 10. Judge Cabell is pretty explicit with defense counsel  
17 Marty Weinberg, and he says, "Mr. Weinberg, you indicated that  
18 you were not interested in any communications between Behman,"  
19 who's a witness in that case, someone who the government had  
20 met with, as I understand it also someone who had counsel, and  
21 what Judge Cabell said was "Mr. Weinberg, you indicated that  
22 you were not interested in any communications between Behman  
23 and his counsel, and I just happen to note that. So I've noted  
24 here that we would specifically be excluding from any  
25 information that would need to be produced those documents

1 involving communications between Behman," who was a witness in  
2 that case," and his counsel. And I think that is an important  
3 distinction here, Your Honor. And again, I'm not going to try  
4 to turn you around on *Gibson*, but I also think that makes it  
5 very different from what we're having here because the exact  
6 thing Judge Cabell is carving out here, the communications  
7 between the witness in *Gibson* and his own defense attorney are  
8 what we're talking about, and Judge Cabell takes that out of  
9 the equation in our view.

10 And I think that's also consistent, Your Honor, with,  
11 you know, the decision in *Parnas* where they say how can -- you  
12 know, the government with information and documents are in the  
13 possession of a filter team, as they describe in *Parnas*. In  
14 *Parnas* was a search warrant. The returns went back to the  
15 government. They were with the government. There was a  
16 special master, absolutely. However, it was executed by the  
17 government. It was in the possession of the government, and  
18 what the court said was documents that are in possession of the  
19 filter team and not accessible to the case team, which is  
20 exactly what we're dealing with here, are not subject to the  
21 Rule 16 -- are not subject to those Rule 16 discovery  
22 obligations, and I think that between the *Parnas* decision, Your  
23 Honor, and the difference that we have here between the  
24 scenario that -- or not the difference. You know, the actual,  
25 you know, the similarity here in our case where we have

1 Dr. Montone and his criminal defense attorney, those  
2 communications aren't carved out, and Judge Cabell himself,  
3 with the defense counsel who's arguing this motion, says, I  
4 want you to know, we're excluding -- I'm not interested in the  
5 communications between the witness and the counsel. And I just  
6 think that -- I think we should take that into account, Your  
7 Honor.

8 THE COURT: Sure. And I think those are great points,  
9 and thank you for raising them. But, for example, in a  
10 situation where you have a tank team looking at something, if  
11 they're looking to exclude, say, attorney-client communications  
12 but they see one that isn't privileged because there's some  
13 other person copied on it or because as, you know, for all  
14 these many exceptions that the defense points out in their  
15 briefing here, then that would get turned over, right? The  
16 tank team is just pulling out privileged communications.

17 And what I understand the defense to be saying here is  
18 you don't know if those emails that you were directed or texts  
19 that you were directed not to look at actually are technically  
20 all privileged, right?

21 MR. CALLAHAN: That's correct, Your Honor.

22 THE COURT: I mean, that's my understanding.

23 MR. CALLAHAN: No, that's absolutely correct.

24 THE COURT: And I think they were just wanting you,  
25 notwithstanding your agreement with the witness, to go through

1 all those sensitive emails and see are they actually *Brady*.  
2 Like, are they not privileged and can be turned over or should  
3 be turned over. So --

4 MR. CALLAHAN: Just one --

5 THE COURT: Yes, go ahead.

6 MR. CALLAHAN: Sorry, Your Honor. Go ahead. Just one  
7 point about that is, and I think what we saw at the end of  
8 *Gibson* and the remedy in *Gibson* was -- very explicitly from  
9 Judge Talwani was let the holder of the privilege do that,  
10 right? And if they want to give that back to us, whatever is  
11 not privileged, and give that back to the government and say  
12 this is not privileged, and then we can review it for, you  
13 know, anything, you know, *Brady*, *Giglio*, or any of those local  
14 rules, we would of course do that.

15 What we don't want to do is, number one, their  
16 consent; number two, a privilege that we don't hold. And we  
17 can't ask them to waive it, Your Honor. You know, the  
18 department explicitly directs us, you may not ask a party for a  
19 waiver.

20 THE COURT: Sure.

21 MR. CALLAHAN: We're told not to do that, and we  
22 didn't do that. And we were very clear. I mean, from the  
23 beginning we were very clear of what we were going to produce  
24 and what we couldn't produce, and it does sound like Mr. Pabian  
25 is here to assert that. I don't know if his attention is to do

1 a privilege log or not do a privilege log, but we will review  
2 anything that is deemed not to be privileged. And I think  
3 Mr. Pabian or counsel who is working with Dr. Montone at the  
4 time is likely in the best situation to determine what the  
5 privilege is because sometimes it follows up, I would imagine,  
6 that you're following up on conversations that you've had not  
7 over text message or, you know, following a phone call. And I  
8 think it probably takes some coordination between counsel for  
9 Dr. Montone and Dr. Montone himself to determine what is  
10 privileged.

11 And we agree. A blanket assertion of privilege, you  
12 know, the case law is clear about that. And I don't think  
13 that's -- you know, that's not what we're saying. We're just  
14 saying we can't even access it yet. They are in a position to  
15 do that and make that determination. We are more than willing  
16 to review the material after they take out their  
17 attorney-client privileged material that they deem as such and  
18 turn it over.

19 THE COURT: Sure. Okay. Okay. Let me hear from  
20 Dr. Montone's lawyer.

21 MR. PABIAN: Yes, Your Honor. So on the preliminary  
22 point of the government's possession, custody, or control, we  
23 agree with the government that these materials are not within  
24 its possession for discovery purposes.

25 You know, it bears repeating that Dr. Montone's phone

1 was provided to the government by consent. There was no  
2 warrant or other legal process requiring its production, and  
3 that consent was explicitly limited.

4 Now, contrary to the defense argument, that message  
5 did not simply say note my name. It said, and I quote, at  
6 docket 110-1, "For purposes of protecting any attorney-client  
7 privileged text messages or emails on his cell phone, please  
8 note the following phone numbers and email addresses," and it  
9 has the information for his two attorneys. So in those  
10 circumstances, Your Honor, it's our position that the Fourth  
11 Amendment prohibits a government search from extending beyond  
12 those parameters that allowed the government access.

13 THE COURT: But here's the problem. You've got  
14 Dr. Montone's intentions in handing that over to the government  
15 but then you have these conflicting obligations the government  
16 has in a criminal case once he becomes a witness and they're in  
17 possession of his phone, and I just think his lawyer should  
18 have thought of that. I know it's a bit of a chess game, but I  
19 do think when you're working on behalf of a government witness,  
20 you're always aware of the fact that everything you say and do  
21 is going to get turned over -- I mean, or at least scrutinized  
22 to see if it's going to get turned over.

23 So I just think -- I think this doesn't happen very  
24 often. There isn't much in the case law about this because I  
25 don't think people do this very often.

1 MR. PABIAN: Perhaps not, Your Honor.

2                   THE COURT: They give the government something as  
3 sensitive as an image of their phone and say please don't look  
4 at certain parts of this and don't, you know, think forward to  
5 discovery. So I think that's why we're missing a lot of case  
6 law on this.

7 MR. PABIAN: If I could simply just make two really  
8 quick points, understanding the Court's leanings on that issue.

9 THE COURT: Yes.

10 MR. PABIAN: The first is, frankly, I think because  
11 this was a Fourth Amendment search and limited by consent, the  
12 government is not in lawful possession of those messages. I  
13 think the government has told the Court here today that it  
14 doesn't believe it has lawful authority to look at those.

15                   The second point is with respect to Gibson. You know,  
16 the defendants rely on the protocol agreement in that case but  
17 neglect to note that that protocol agreement did allow the  
18 government to, quote, access the entire server in the event of  
19 a subsequent criminal proceeding. There's no similar  
20 permission granted in this case on that point.

21                   And then just shifting gears a little bit -- so that's  
22 the preliminary issue, right, is whether these are within the  
23 scope of discovery. The secondary issue, if the Court rules  
24 against the government on that point, is what's the remedy.  
25 And again, we think, just as Judge Talwani held in *Gibson*, it's

1 a privilege log. And again, as the government noted in its  
2 argument, the sole materials we're talking about here,  
3 Dr. Montone's communications with his counsel, were off the  
4 table from square one in *Gibson*.

5 So I think it's important to be really clear about  
6 what the defendants are asking. They're asking this Court to  
7 order the government to review all of Dr. Montone's  
8 communications with his criminal defense counsel --

9 THE COURT: Sure, but I don't think we're going to do  
10 that. I think what would happen is I would ask the government  
11 to extract the emails that they deemed not to be in their  
12 possession, the ones, you know, that were listed by your  
13 client, and see how many of those are there, and then not  
14 review them but turn them over either to you for -- to create a  
15 privilege log or -- and/or to me to look at them and see if any  
16 of them constitute *Brady*. So you don't happen to know when the  
17 communications on the phone began, do you?

18 MR. PABIAN: I don't, Your Honor.

19 THE COURT: Okay.

20 MR. PABIAN: But that's certainly information we can  
21 get if we're ordered to do so. You know, with respect to those  
22 two options, without waiving our arguments on the preliminary  
23 point, we do think that the appropriate remedy is a privilege  
24 log process. You know, the defendants -- there's a burden that  
25 needs to be met for in-camera review, for a party to be

1 entitled to in-camera review.

2 With respect to the crime fraud exception, which the  
3 defendants have raised here, there's Supreme Court case law on  
4 point, *Zolin*, and that's at 491 U.S. 554. The defendants don't  
5 cite that case. They don't try to make the type of showing  
6 that's required by that case. And instead, they really fail to  
7 articulate any specific basis at all to believe there are  
8 material communications.

9 The cases that they've cited on that issue, on the  
10 notion that the privilege can be overridden here by defendants'  
11 Constitutional rights, are clearly distinguishable. By and  
12 large they involve specific materials that have been identified  
13 as highly material to the case.

14 In *Murdoch v. Castro*, it was a letter by the witness  
15 to counsel, a specific letter, that exonerated the defendant.  
16 You know, we don't have any showing like that here. And it's  
17 our view --

18 THE COURT: Let me just say, with regard to *Brady*, the  
19 government has an obligation just simply to review all the  
20 materials in its possession for *Brady*, and I just think this  
21 very peculiar fact situation here is they happen to be taking  
22 the witness's direction about what they should not look at, and  
23 so they have not looked at certain things, accepting that those  
24 things are privileged. We don't really know if they are or  
25 not.

1                   And I do think the defendants -- *Brady* does not  
2 require that you say we happen to know there's a letter in this  
3 there exonerating our client.

4                   MR. PABIAN: Yes.

5                   THE COURT: So you know, I just think -- this is a  
6 very odd fact situation, and I haven't ever seen anything like  
7 this before. But I do think -- I'm going to go back and look  
8 at *Parnas* again, and I'll read the transcript of the other case  
9 just to make sure I really do understand the facts there.

10                  But at least right now my intention is to say that  
11 these materials are in the government's possession, and if they  
12 are truly privileged, they should not be turned over. If  
13 it's -- if it's this man asking or receiving legal advice from  
14 his lawyer, that's obviously protected. But if there is *Brady*  
15 information in there and it's not privileged, we need to know.  
16 So I don't know.

17                  Mr. Pollack, do you want to say anything more about  
18 this?

19                  MR. POLLACK: I do because I think the *Gibson* case has  
20 been mischaracterized a bit by people who weren't a part of it.  
21 And I can say that the issue that was before Judge Talwani  
22 there -- and I think in ways Mr. Callahan referred to this but  
23 spun it in a way -- there wasn't a concern by defendants about  
24 getting more than that privilege log there. Here there is.  
25 Here we're looking for specific *Brady* material. Behman was not

1 the person who turned over his communications. A law firm  
2 turned over its server, right? It was a different setting.

3 And where the parties were able to guide the remedy,  
4 one thing that's certainly not in *Gibson* is Judge Talwani  
5 saying, oh, it would be a big error for Magistrate Judge Cabell  
6 to have done an in-camera inspection. That doesn't appear  
7 there. In the right setting, that's the easiest remedy, right?  
8 That takes -- that creates the least amount of issues here  
9 while safeguarding *Brady* rights.

10 Because what we do know is from what the government  
11 has turned over, to the extent we take their representations at  
12 face value, it would appear that -- if I can get an exact date,  
13 I think -- Dr. Montone's first visit to their office was --  
14 actually, I have 2018. I don't know -- what's that?

15 MR. SOLOMON: December.

16 MR. POLLACK: Right. So we'd expect there would be  
17 some advice leading up to that. We'd expect that there might  
18 be a relay, a conduit, as we've cited in the case law, of facts  
19 such as the government wants to hear if you'll say this. It's  
20 not legal advice. That's referring to what the government has  
21 said, and I understand why the government might not want us to  
22 get that, but that's clear *Brady* material in the category we've  
23 cited of unreliability of the government investigation.

24 I really want to remind Your Honor, unlike in *Gibson*  
25 here, the grand jury has decided to indict a conspiracy period

1 through at least December -- June 2019, and we have to defend  
2 that. And we have government actors all over the place by then  
3 for a couple of years getting their fingers and voice and ears  
4 all over people who the grand jury has decided could be actual  
5 or potential, named or unnamed, known or unknown  
6 coconspirators, and we have to defend against that through  
7 the -- not just a very important mens rea defense in terms of  
8 all the kinds of things that normally happen, but government  
9 actors permeating the events at issue through the charged  
10 conspiracy period, which, you know, I think the grand jury has  
11 essentially, in some ways, left open the possibility that a  
12 jury could find that Dr. Montone was a conspirator through some  
13 date in the charged conspiracy.

14 It's important to us to know what the government has  
15 influenced at some point, to know if Dr. Montone would not  
16 share any possible goals of other people who are allegedly  
17 culpable in the action because that could remove one potential  
18 co-conspirator, which we're allowed to do as part of our theory  
19 of defense.

20 Finally, I'd say with regard to the burden to do an  
21 in-camera inspection, the case law is really clear. It's very  
22 light of what it takes for an in-camera inspection because it's  
23 not considered intrusive to do an in-camera inspection. It's  
24 considered protective, Your Honor. And it probably goes  
25 without saying we have a lot more faith in Your Honor deciding

1       whether something is privileged or fits within exception or  
2       constitutes *Brady* than we would in a tank team doing it  
3       somewhere or even Dr. Montone's counsel, who, you know, this is  
4       going to slow down this case by months if it goes that way.  
5       When I think -- I am taking an educated guess that we're going  
6       to see at most dozens of emails, not -- certainly not thousands  
7       and not hundreds. You know, there will be --

8               THE COURT: Okay. I'm going to take another look at  
9       everything, and then I'll try to make a ruling very shortly,  
10       within the next few days, on this, but -- and I'll do something  
11       in writing but not a huge long order. Okay. So I --

12              MR. CALLAHAN: Your Honor, could I follow up, and this  
13       is just the last point, and if you want to move on, I can skip  
14       it.

15              THE COURT: It's okay.

16              MR. CALLAHAN: But the only comment I had is I  
17       understand the in-camera review and the desire for that, and  
18       I've seen that and we see that as a step when people are  
19       challenging a privilege log. It does seem consistent with what  
20       the remedy was in *Gibson* that -- that the, you know, the holder  
21       of the privilege create a privilege log, gives it to  
22       defendants, and then, you know, if there are, if there is  
23       follow-up, they are in a position to challenge that and  
24       those -- you know, we can -- that can go before the court.

25              There can be an in-camera review here in that

1 instance, but I'm not sure why, just looking even at the case  
2 law in the light most favorable to the defendants here, why we  
3 would be doing something beyond *Gibson* when I think, what we  
4 believe, *Gibson* isn't. You know, it's unique and distinct for  
5 those reasons, and there is another case out there that, you  
6 know, goes the other way.

7 THE COURT: So I do just think that in this case where  
8 you have a witness who has a motive to side with the government  
9 and help the government, it's a bit different than the  
10 privilege holder in *Gibson*. But anyway, I'll give that some  
11 thought, and I appreciate your argument on that.

12 MR. PABIAN: Your Honor, could I have two sentences on  
13 that point, and I apologize, on behalf of Dr. Montone.

14 THE COURT: Yes. Go right ahead.

15 MR. PABIAN: I just want to note that respectfully  
16 there is an intrusion on the privilege that's caused by the  
17 requirement to turn over privileged documents to a court.  
18 That's why there are cases like *Zolin* requiring a specific  
19 showing that the defendants haven't addressed here.

20 You know, so with that, we'll rest on our arguments,  
21 but we do -- we do prefer the resolution of a privilege log,  
22 and we think that's the appropriate resolution.

23 THE COURT: Okay. And let -- I'll take a look at the  
24 *Zolin* case, but another possibility is that you produce a very  
25 descriptive privilege log and then we don't need to have an ex

1       parte -- I mean, we can take it one step at a time and do the  
2       privilege log and see if that's sufficient. I mean, it may be  
3       there's very few communications here, and they're very clearly  
4       privileged, right?

5                    MR. PABIAN: Yes, I would agree that that's how it  
6       should work, is that we would produce a privilege log and the  
7       defendants be free to challenge any entries on that privilege  
8       log that they see fit.

9                    THE COURT: I will just say, in my somewhat limited  
10       experience in looking through materials for exculpatory  
11       evidence that fits the *Brady* rubric, it's much better to have  
12       some indication from the defendant as to what their theory of  
13       the case is and what might help them, like Mr. Pollack's  
14       description of the co-conspirators, et cetera, just now. And I  
15       don't think they'd be inclined to provide you with that. So,  
16       you know, that's one consideration here.

17                   But it's a little bit strange that we really have no  
18       idea what we're talking about because you weren't the lawyer,  
19       and I don't think you know what those communications hold. So  
20       let's -- maybe we'll just take it one step at a time like that.  
21       But anyway, okay.

22                   MR. POLLACK: Your Honor, just really briefly on that  
23       because I think it needs to go directly to the in-camera review  
24       not only for the timing of this but that's the only way to  
25       comply with *Brady* here. We know that Judge Talwani has found

1 in a setting like this -- I think the government has to concede  
2 that to the extent that Judge Talwani's statement of the law is  
3 correct, that this is in their possession, it needs to be  
4 reviewed for *Brady*.

5 What we're doing is actually excusing the government  
6 from the conflict it created for itself by allowing -- not  
7 allowing -- but by having Your Honor allow it to be done by  
8 you, and that solves the issue. You know, I've always wondered  
9 tank teams when they do that, they're violating the  
10 Massachusetts Rules of Professional Conduct by looking at  
11 privileged materials. But you know what? The Confrontation  
12 Clause, Compulsory Process Clause actually override those types  
13 of concerns.

14 So Your Honor's -- I think it's been close to an offer  
15 of potential proposal to review what should be a limited number  
16 of documents in camera solves the problem -- the dilemma that  
17 the government has created by post *Gibson* taking in a phone  
18 rather than having it imaged without those, and I guess,  
19 indicating it and letting us fight it out the other way. But I  
20 think otherwise it's a *Brady* violation that continues if this  
21 isn't reviewed by an appropriate party. There's just no way  
22 that Dr. Montone and his counsel is authorized to make *Brady*  
23 determinations but Your Honor is. I leave it on that, Your  
24 Honor.

25 THE COURT: Okay. Let me just say one thing, which

1 is, I'm going to ask the government to somehow figure out how  
2 many communications we are talking about and to email counsel  
3 and Mr. Vieira with that information when you can get it. And  
4 that would be helpful if I could have that maybe in the next 48  
5 hours or so. I won't hold you firmly to that, but if you can  
6 just figure out what is the universe of material that we're  
7 talking about.

8 MR. CALLAHAN: Absolutely.

9 THE COURT: Thank you. Okay.

10 So number 2, interactions between the criminal and  
11 civil team. So I really think you have an uphill battle on  
12 this one, Mr. Pollack.

13 MR. POLLACK: It is, but I bring up the -- I think now  
14 is the time when I can give the other several categories of  
15 Brady material, and this flows from what I've already raised  
16 about the fact that part of the charged conduct involves a time  
17 period when the government was interacting with -- I think Your  
18 Honor probably has enough of the background -- you know,  
19 surgeons who were parties to consulting agreements, many of  
20 whom had their own lawyers, at least as of the time of  
21 contracting.

22 THE COURT: So let me just say, you want all the  
23 communications between the civil and criminal teams about these  
24 surgeons, but the government is representing that it has looked  
25 through everything for *Brady* and there is none. So -- yeah.

1                   MR. POLLACK: I've heard that sentence once or twice  
2 or 40 times before that we know what *Brady* is and we've done it  
3 and taken care of. I think what Your Honor is referring to is  
4 on page 14 of their opposition where they call the request moot  
5 because they've done the functional equivalent of what we're  
6 asking for. We disagree. And in part that's because I think  
7 there's been -- there had to have been under the circumstances  
8 of what we've seen in discovery a gross underestimate of what  
9 constitutes *Brady* material in a case like this, which has all  
10 of the usual mens rea issues.

11                   So obviously anything that would indicate Dr. Chin or  
12 anyone at the company, to the extent the company is charged,  
13 acted believing what they were doing was genuine, I think the  
14 government would say it's aware of that. And I think the  
15 government would say it's looked through what it's looked  
16 through, which may not be everything, but it's looked through  
17 what it's looked through for those kinds of things.

18                   But, Your Honor, it's much broader here, and I start  
19 with what I raised -- and I would go in more detail in an ex  
20 parte submission, but I'm comfortable giving some categories to  
21 Your Honor to understand the sort of breadth of *Brady* as we see  
22 it.

23                   So the government charges that these contracts with  
24 consultants were a sham, and they attack in part the structure  
25 of them. So the extent that they're interacting, and I think

1 it takes on significance that they're interacting with the  
2 alleged co-conspirator surgeon consultants during what the  
3 grand jury has said is the conspiracy period. Anything in  
4 which the surgeons, and I think almost all of them indicated at  
5 one time or another that the -- that the contracts were genuine  
6 and that they performed under them, that the government may  
7 also agree -- well, to the extent anyone said this is real,  
8 we've turned that over. But it goes beyond that.

9 And this is that the government is conducting this --  
10 what we believe is a joint investigation, Your Honor, not  
11 characterized best as a parallel, but it's a joint  
12 investigation in which there was communication about witnesses  
13 and about how to deal with witnesses and what the requirements  
14 were going to be to resolve things with witnesses during the  
15 alleged conspiracy period as set by the grand jury.

16 So when -- I don't know that the government would have  
17 agreed that whenever a surgeon takes on some accountability and  
18 says in certain ways I didn't perform, each and every way that  
19 happens is also *Brady*, because the theory of defense here could  
20 be this was all genuine. Another layer of it is this is not  
21 only genuine but there are lawyers appearing for different  
22 parties, including the company, including some of the surgeon  
23 consultants. This is something that even if a problem  
24 developed and the surgeons didn't actually perform as intended,  
25 it's the surgeons' or consultants' fault. Then we're also

1 entitled to any communications that show the presence of  
2 lawyers during the conspiracy period.

3 So whatever emails the government is having about  
4 internally and externally involving lawyers for any of the  
5 alleged co-conspirators during the charged conspiracy period,  
6 and I still find the timing of the investigation -- not the  
7 timing of the investigation, but the timing of some active  
8 investigation during the conspiracy period as creating an  
9 uphill battle for the government here because they're  
10 influencing people -- one of our defenses can be, by that time  
11 that person is acting as a government agent. That person is  
12 cooperating with the government so a jury cannot find that our  
13 client conspired with that person because there was not a  
14 shared objective.

15 So you have the presence of lawyers for any of these  
16 parties. So when the government is saying so and so lawyered  
17 up, that's *Brady* material. When they lawyered up and the  
18 government became aware of it, it affects the government's  
19 investigation, when the government does say something to  
20 someone, one of these surgeon consultants, if you resolve the  
21 civil case you avoid the criminal case, and that involves  
22 lawyers present. That helps this defendant during the charged  
23 conspiracy period, that was what was going on with some people.  
24 Then you have just the general.

25 We cited to some cases about this in our reply on -- I

1 think it's in footnote 3. I think it's on page 16 -- my  
2 handwriting looks like 18 -- of our reply. And this seems  
3 particularly appropriate in a case like this where the grand  
4 jury has charged that kind of a time period. A party is free,  
5 says the Supreme Court, to attack the law enforcement's --  
6 examining the law enforcement on good, effective knowledge of  
7 someone's statements and attack the reliability of the  
8 investigation in failing to even consider someone's guilt, and  
9 that could be that one of their cooperators is the only guilty  
10 party and someone is doing that.

11           But when they start by demonstrating knowledge of  
12 self-incriminating statements, the defense laid a foundation  
13 for a vigorous argument that law enforcement would be guilty of  
14 negligence. We're allowed to say that, how they handled these  
15 witnesses was inappropriate, whether because the government was  
16 saying resolve a civil case by admitting one, two and three, or  
17 one, and there will be no criminal charges.

18           We cite to another case there that has that same sort  
19 of weaknesses in a government's investigation here during the  
20 charged period, which makes it somewhat unique. We've cited to  
21 Judge Saris in the *Wu* case on page 15 of our opening brief, 210  
22 Westlaw 817324, consider the theory of the defense balancing  
23 the government's claim of entitlement to have inter- and  
24 intra-agency communications with our right -- that defendant's  
25 right to prepare a defense, and Judge Saris said has to be

1 turned over. There might be limits on further disclosure but  
2 it gets to the -- you know, it gets to the defense to use -- to  
3 advance the theory of the case.

4 So I'm not -- I'm quite certain the government hasn't  
5 detailed its awareness of the various forms of *Brady* that I've  
6 outlined and more that we would supplement with Your Honor,  
7 but, you know, I understand that there's a general category of  
8 when people say nice enough things about the defendants we  
9 consider it *Brady*. They also have not identified what they  
10 reviewed. They reviewed the file. They didn't say they went  
11 through the intra- and interagency communications, and I think  
12 that's extremely important here, Your Honor, at least to the  
13 extent that they occurred during the charged period and  
14 involved anyone who's a potential named or -- I'm sorry --  
15 known or unknown co-conspirator.

16 And the grand jury, you know, we often, as defendants,  
17 have to hear how independent the grand jury is in a way that  
18 can impact defendant's rights. But here the grand jury has to  
19 be deemed a party that set the parameters of the charges, and  
20 it set those charges to include a period in which the  
21 government was interacting extensively with people who would  
22 fit within the phrase "known and unknown co-conspirators." And  
23 I think a great deal of our defense will involve or could  
24 involve -- I don't have to promise that at this stage, but it's  
25 certainly preparing the defense to involve assessing every step

1 the government took with alleged known/unknown, named/unnamed  
2 co-conspirators during the charged period which ran at least,  
3 the words are at least through June 2019.

4 And I can say during that time AUSA Derusha and AUSA  
5 George had appeared in the civil case that was pending. They  
6 did that back in the -- AUSA George in 2015, AUSA Derusha I  
7 think on June 6th, 2018, and then they proceeded after  
8 that with -- and since their appearance there, there have been  
9 five interviews of Dr. Montone alone, and that's one of, I can  
10 say many or several of surgeons.

11 Another one, Jeffrey Carlson, on July 27th, 2018, an  
12 FBI agent, AUSA George and AUSA Derusha interviewed him, and  
13 not until, I think it's almost more than a year and a half  
14 later, AUSA Derusha and AUSA George file in a civil case an  
15 intent to intervene in the qui tam action, and it's only a  
16 month or so or more after that when they withdraw and make  
17 themselves just part of the criminal investigations they were  
18 doing. But certainly up until then there hadn't been that sort  
19 of spit -- steady space that would involve something that's  
20 parallel as opposed to joint.

21 I understand the FBI may only have worked on the  
22 criminal aspect of it, but I would think that the people at  
23 HHS, from what we've seen, might have people -- it would be  
24 expected to have people on both the civil and criminal. So we  
25 haven't received the kind of information -- I break this into

1 two categories. One, I think the government hasn't done  
2 enough, even close, to meet its *Brady* requirements. Separate  
3 or related to that, we cite to *Bases, Martoma, Mahaffy* on pages  
4 16 and 17 of our opening brief with the kind of information the  
5 Court will often request from the government in order to better  
6 assess this issue. So we don't know what the government means  
7 when it said it looked through the files for *Brady* so this is  
8 moot. Did they actually look at the communications with all  
9 counsel for potential witnesses? The mere fact that they're  
10 lawyered up is *Brady*.

11 I've seen many a case defended on the fact that there  
12 are enough lawyers there someone couldn't have thought  
13 something was fraudulent because no lawyers were jumping up and  
14 down yelling anything. Everyone has heard that. There are  
15 times the government doesn't charge when there are this many  
16 lawyers this close to events, let alone involve themselves in  
17 the charged time period that the grand jury has determined.

18 So I would ask Your Honor to look at the types of  
19 information required, and we reiterated from those or drawn  
20 from those what's relevant in this case and in our conclusion,  
21 but certainly more is required of the government in terms of  
22 justifying what, here it seems a fair inference, was a joint  
23 investigation, not a parallel investigation. Even in parallel  
24 investigations this kind of information has been required to  
25 understand what really needs to be done so that we can defend

1 ourselves against allegations that we, meaning our clients,  
2 were conspiring with people during a time period when they were  
3 interacting with the government extensively and that lawyers  
4 were interacting with the government extensively, and we're  
5 entitled not just to know that generally, but we're entitled to  
6 defend ourselves against very serious charges because we do  
7 know the record contains information that there were -- there  
8 was a mix of how to resolve one case and another, that if  
9 you -- this is in Attorney Orkand's declaration at paragraph 8  
10 that one witness's counsel said that he was told if they  
11 resolved the civil case he can avoid criminal charges.

12 So we know this has been mixed and matched, and we're  
13 entitled to the government actually going through what it has  
14 including intra- and interagency communications, not just so we  
15 get a taste of it but so that we could make effective use on  
16 cross-examination of what actually exists and what actually  
17 happened in there that caused virtually every surgeon to go  
18 from saying this is real, my attorney said it was okay, to  
19 eventually after enough interaction with the government some of  
20 them saying, okay, it wasn't real.

21 And we're entitled to explore that for the weaknesses,  
22 for the improprieties in the government's investigation, and to  
23 cross-examine -- not just cross-examine but -- it's not  
24 cross-examine the issues, it's the actual events that the grand  
25 jury has chosen to charge, the time period of it, when the

1 government was so extensively interacting.

2 So we'd ask for both a more extensive and adequate  
3 *Brady* search and report to the Court with details about what  
4 they did, not just that it's moot because they have done the  
5 functional equivalent, and we'd ask for the type of relief  
6 we've drawn from *Bases, Martoma, Mahaffy* on pages 16 and 17 of  
7 our opening brief on the kinds of information about who worked  
8 on what, when, and their interaction with these witnesses.

9 And even if someone who was civil and criminal at one  
10 point but then becomes only criminal is communicating where  
11 there's a civil attorney and saying there's a problem with this  
12 witness, I'm not so sure that's work product in the middle of  
13 the charged period, but certainly they've got detail to say,  
14 this witness is saying X, and we want that witness to say Y.  
15 Anything in that direction we're certainly entitled to, and I  
16 don't think they've even made that kind of a search through  
17 their own communications and the communications of the agents  
18 that were involved in underlying events with people who could  
19 be considered by a jury to be known or unknown co-conspirators  
20 charged by the grand jury, Your Honor.

21 So I think while an uphill battle, I think we meet it,  
22 and I think the government, given the type of charge the grand  
23 jury has put in here, has its uphill battle, Your Honor.

24 THE COURT: All right. I'll hear from the government.

25 MR. DERUSHA: Thank you, Your Honor.

1                   There are a few important points that I want to  
2 emphasize this afternoon. I know we've been going for a while,  
3 but I want to begin with an example that defense counsel  
4 explained with one of the surgeons that settled civilly with  
5 the government because I think it illustrates the fundamental  
6 misunderstanding that the defendants have or at least purport  
7 to have in connection with this piece of their motion to  
8 compel.

9                   Dr. Carlson is a surgeon that settled civilly with the  
10 government. And Mr. Pollack describes a meeting that  
11 Dr. Carlson had with the government who was at that meeting.  
12 And how does he know that? He knows that because we produced  
13 the report of that meeting. That report notes the counsel that  
14 was present, the statements that were made by Dr. Carlson. And  
15 he knows those things because we provided them to him and did  
16 not shield the civil investigation from the search for  
17 discovery material, *Brady* material, anything else that they're  
18 entitled to under the discovery rules in the criminal case.

19                   Foundationally, I want to go back to sort of the  
20 basics here which is that the government has conducted a joint  
21 investigation that had both a civil and a criminal component.  
22 The government has been transparent about the fact that this  
23 joint investigation had both a civil and criminal component  
24 from the outset in 2017 and at every step of the way since.

25                   I think Your Honor is right that the defendants have

1 an uphill battle in showing that they're entitled to more than  
2 what the government has already produced. It's well-settled  
3 law, Your Honor.

4 I think you're familiar with the cases that we cited  
5 in the briefs, but just to touch on them briefly, it's well  
6 settled that there's nothing improper about the government  
7 undertaking simultaneous criminal and civil investigations or  
8 of undertaking simultaneous criminal and civil enforcement  
9 actions. The Ninth Circuit recognized that in *Stringer*, the DC  
10 Circuit recognized that in *Dresser*, and most importantly,  
11 perhaps, *Kordel*, the Supreme Court case in 1970, recognized  
12 that in saying that it would stultify the enforcement of  
13 federal criminal law to require a government agency invariably  
14 to choose either to --

15 THE COURT: I don't think I'm going to accept the fact  
16 that it was improper for the government to engage in a  
17 simultaneous civil and criminal investigation. So that's fine.  
18 I accept that.

19 But I guess the question really is, given the facts of  
20 this case and what Attorney Pollack says about the time period  
21 that the charges cover as indicted by the grand jury, and then  
22 that's the same time period in which you're interviewing these  
23 witnesses and settling out a criminal case, you know, telling  
24 Dr. Carlson he doesn't need to be charged criminally,  
25 blah-blah-blah, what was your *Brady* search during that time?

1                   MR. DERUSHA: Yeah, I appreciate the framing, Your  
2 Honor. I think we said this to the defendants in our discovery  
3 correspondence, we've said it in our opposition, we'll say it  
4 again now. For purposes of *Brady* and Rule 16, the government  
5 did not draw any distinction whatsoever between the criminal  
6 and the civil aspects of the investigation, or to put it  
7 differently, the government has searched the files of  
8 attorneys, of staff, of law enforcement agents, or anybody else  
9 who worked on civil aspects of the joint investigation or  
10 criminal aspects of the joint investigation.

11                  THE COURT: And when you say "attorneys," you mean the  
12 doctors' attorneys emailing you, you emailing each other, et  
13 cetera?

14                  MR. DERUSHA: Your Honor, what I mean is that what we  
15 have done here is the same thing that happens in any  
16 run-of-the-mill criminal case. There is an investigation, and  
17 the government conducts a review of that single investigation's  
18 files for any discoverable material, including *Brady* material.  
19 Here there was a joint investigation. There was joint  
20 fact-finding, and we have searched the files of that  
21 investigation. We have never contended, the government has  
22 never contended that it could shield the civil components of  
23 the investigation from that search for materials wherever they  
24 may be found, whoever they may involve.

25                  And so it doesn't make any more sense here to conduct

1 the kind of evidentiary hearing or to rummage through the  
2 communications of the lawyers who are litigating the case or  
3 the civil case than it would in any run-of-the-mill criminal  
4 case. We are not contending that there is a separate body of  
5 information that we have no obligation to --

6 THE COURT: So I think what they specifically seem to  
7 be focusing on are the interactions between the criminal and  
8 civil teams, and I guess a lot of that is going to be work  
9 product and it's going to be protected and you get to discuss  
10 your case with your colleagues, obviously, and not have that be  
11 discoverable.

12 But I guess they're just asking, and it has been a  
13 very long investigation, and it seems to be involving a lot of  
14 people being questioned about what they did, and then they  
15 change their stories and so on.

16 And I just wonder, have you gone through the emails of  
17 the team members, including law enforcement, but also the  
18 different attorneys, and scoured that for *Brady*?

19 MR. DERUSHA: Your Honor, we have conducted the same  
20 review that we do in every case, which includes all information  
21 that we're aware of. And again, I want to emphasize what  
22 the -- what the defendants have and how this has played out  
23 with respect to settling surgeons, including Dr. Carlson,  
24 because I think this is illustrative of the reality and not  
25 just arguments about, you know, potential information that they

1 think that we haven't searched for despite our repeated  
2 assurance that we have searched for that kind of information.

3 The defendants know about -- with respect to any  
4 civilly settling parties, they know if those settlements  
5 resulted in written agreements because we produced copies of  
6 them. If there was an interview or a meeting with the witness,  
7 we produced a report of that.

8 THE COURT: That's all typically produced. But I  
9 don't know that there's any allegation that you've withheld  
10 meetings or that type of thing. What I thought Attorney  
11 Pollack was kind of focusing on was the interaction between the  
12 civil and criminal teams, and I know you're entitled to protect  
13 your work product and I'm not suggesting you get at that, but I  
14 do just want to make sure that that's been searched for *Brady*.

15 I think as these cases develop, sometimes, you know,  
16 you do have an ongoing obligation, and I'm not suggesting  
17 that's all you do in preparing a case, but I think, as motions  
18 like this get filed, sometimes it comes into focus a little bit  
19 more what the defense is seeking to use at trial and that type  
20 of thing. And I do think you have an obligation, especially if  
21 there's a fairly specific request like this, to make sure  
22 you've looked. And what I hear you saying is we do what we do  
23 in every case, and I don't really hear you saying, yes, we've  
24 done that, what you're specifically asking about.

25 MR. DERUSHA: Your Honor, we have searched for *Brady*

1 material that includes through emails. If we discover  
2 information that has not been produced but it's *Brady* material,  
3 we're aware of our ongoing obligation and would abide by our  
4 ongoing obligation.

5 But the key point, though, is this, when there is a  
6 joint investigation, because that's really what the motion is  
7 arguing, is that there's an additional obligation. And what  
8 I'm saying is that we understand there's an additional  
9 obligation. That's to broaden the scope of where you look or  
10 at least not to shield off part of the investigation under, you  
11 know, for the reasons that it was civil or that it was a  
12 different government agency conducting that piece of the  
13 investigation, and we have not done that.

14 And I think that the -- well, the defendants' papers  
15 go far beyond just searching for, you know, email  
16 communications the way that Your Honor just phrased it. They  
17 want all of our communications with one another. They want an  
18 affidavit describing every communication that we've had with  
19 one another.

20 THE COURT: I don't think that -- I don't think that's  
21 required, and I've never seen that required in a case. And I  
22 appreciate your transparency. I mean, I did recently have an  
23 SEC case where the government went to great pains to keep the  
24 investigation separate from the criminal case, and there was  
25 very little overlap and very little searching for *Brady*, and so

1 I think it's great what you've done.

2 I do think they have a rather advanced view of what  
3 *Brady* constitutes -- you know, what constitutes *Brady* here.  
4 And I hope you will keep looking as you hear from them what  
5 they consider to be important to their defense. I'm not going  
6 to order you to provide every -- an affidavit with every  
7 communication in it. I don't think that's required. I'll take  
8 another look at the pleadings because these -- I know we just  
9 got something late last night that I only read through once,  
10 but we will -- I hear you on that.

11 MR. DERUSHA: And, Your Honor, we, of course,  
12 understand our ongoing obligation, and we do have that in mind.

13 There are two other issues that I want to touch on  
14 because there is some fairly significant things that the  
15 parties -- that the defendants have said in their papers that I  
16 want to address before we wrap up today. And that is, when  
17 there are joint investigations, there are two kinds of concerns  
18 that courts have identified. One is the scope of what the  
19 government is obligated to search for. We've been talking  
20 about that. The other concern is about whether there has been  
21 transparency with the parties about the fact that there is a  
22 joint investigation and the fact that there is the possibility  
23 of criminal enforcement when there is a civil matter going on.

24 And I want to address an argument that defense have  
25 made in the papers in the parallel civil matter that the

1 parties -- these defendants are being coerced into a  
2 settlement, which they say that entitles them to additional  
3 discovery in the criminal case. And I want to be crystal clear  
4 about this, that the criminal team here, although we have not  
5 separated for purposes of conducting a review for *Brady*  
6 information and for other discoverable material, we have not  
7 separated the teams for that purpose. We have separated the  
8 teams for purposes of litigating the civil case and the  
9 criminal case and for the purposes of, you know, the settlement  
10 is reached in the civil matter. We're not involved in that.  
11 There's a separate government team that's handling that.

12 But the defendants seem to be suggesting that the  
13 criminal case emerged only because civil settlement discussions  
14 had stalled and then the government sought an indictment for  
15 that reason, and they also contend that the civil settlement is  
16 a result of coercion in the criminal case. And these are  
17 significant things for the defendants to say. And I want to  
18 address this briefly, each of those points.

19 With respect to the civil settlement, if it is the  
20 position of the defendants that they are being coerced into  
21 entering into that civil settlement, I think they should say so  
22 to the Court today, and if that is their position, we would  
23 expect that they would walk away from the civil settlement. No  
24 party should enter into a resolution that they are not entering  
25 into freely and voluntarily, and they should not represent to

1 the Court, and as I believe they have in the civil case, that  
2 there is an agreement in principle.

3 On the other hand, if they do wish freely and  
4 voluntarily to settle the civil case, that's up to them, that's  
5 up to the civil attorneys handling the matter for the  
6 government, but they can't have it both ways, suggest that  
7 there's coercion forcing them to do something. If they are  
8 being coerced, they should not settle the civil case.

9 So I just want to be clear that we're not involved in  
10 those negotiations, to the extent they're ongoing, but it is  
11 certainly not a ground for additional discovery in the criminal  
12 case. With respect to the timing of the indictment, because  
13 this is important to us, that there be --

14 THE COURT: So I think you did a great job in your  
15 brief, and I don't have any issue with the timing of the  
16 indictment.

17 MR. DERUSHA: Okay.

18 THE COURT: I think you did a great job answering  
19 that.

20 So I would like to move on to 108 and hear the  
21 government briefly. And I'll just say, I don't really  
22 understand the legal basis for filing a motion for discovery  
23 for such an old administrative subpoena. I just don't -- I  
24 don't know if that's really proper to be -- for me to be  
25 treating it as a discovery matter in the criminal case.

1                   MR. DERUSHA: Your Honor, I'm happy to address this  
2 briefly because I think it does boil down to just a few salient  
3 points. You know, we filed our motion as not a Rule 16 motion.  
4 We filed it pursuant to the statute that allows us to seek,  
5 allows the government to seek the aid of any court's compelled  
6 compliance with an administrative subpoena. It's obviously  
7 related to this case, and so we filed it on the docket.

8                   THE COURT: Do you know of another case in which -- a  
9 criminal case in which something like this has been litigated?

10                  MR. DERUSHA: I think the defendant explained it in  
11 the Insys case where there was a post-indictment subpoena.  
12 There was an indictment issued post subpoena. I'm sorry. A  
13 subpoena issued post indictment, and that was brought before I  
14 believe it was Magistrate Judge Boal in connection with that  
15 case. There was not a separate docket. And I think that  
16 sometimes happens in the context of, for example, it hampers  
17 orders where there are third-party subpoenas to collect  
18 information pursuant to a HIPAA subpoena, and I think those two  
19 end up filed, if they are related to a pending criminal case,  
20 on the docket of the pending criminal case.

21                  But I think, Your Honor, really the issues boil down  
22 to just four points.

23                  THE COURT: Can I just ask you again. Do you know of  
24 a case in which a pre-indictment HIPAA subpoena was then the  
25 subject of a motion during a criminal case? I just don't -- I

1 mean, again, this case just has so many weird twists, but it's  
2 just a very old HIPAA subpoena, and I don't know that I ought  
3 to be enforcing it here during the criminal case. You have --  
4 I mean, the entity is a criminal defendant, right? And now I'm  
5 enforcing a very old subpoena against it during the criminal  
6 case. It just feels odd.

7 MR. DERUSHA: Your Honor, I'm not aware -- the  
8 government is not aware of a case that addresses this  
9 particular issue. I don't think the defendants are either.  
10 What they have cited, and they acknowledge that this is the  
11 case, that they're citing a case where there are subpoenas  
12 issued after the indictment. So I'm not aware of a case where  
13 that --

14 THE COURT: I'm just always really wondering whether  
15 there's no case law of this because it just isn't done. It's  
16 like no government lawyers have been trying to do this. This  
17 is like -- because I know the statute says any court can  
18 enforce it, but I just -- we are in the middle of a criminal  
19 case. So -- yeah.

20 MR. DERUSHA: Well, Your Honor, I say a few things.  
21 First of all, the standard that applies to administrative  
22 subpoenas is straightforward, and it asks whether the subpoena  
23 was validly issued. It was validly issued. There's really no  
24 contention about that here. It was valid when issued. And  
25 then -- but the rest of the analysis, which the case law Judge

1 Burroughs set this forth in *Joint Active Systems*, which we  
2 cited, is a limited review, and asks whether the materials are  
3 material, and then if they are, the burden shifts to the  
4 parties subpoenaed to show that it would be unduly burdensome  
5 to produce them. Those are the only valid questions.

6 There's no authority that the defendant has cited, and  
7 there's no authority that we're aware of, that a validly issued  
8 subpoena expires most of the time. So we think those are the  
9 only questions that the Court needs to answer, and I suppose  
10 the reigning question, which is a logical one, is whether  
11 SpineFrontier has already complied with the subpoena. I don't  
12 think that there's any contention that they have with respect  
13 to the net sales data that is the subject of the motion. We've  
14 asked for that data. The company had produced a summary  
15 spreadsheet that showed both gross sales and net sales. It was  
16 a simple document, but it was produced by a lawyer for the  
17 company. And for a variety of evidentiary reasons, and to  
18 avoid litigating issues around who was producing it in what  
19 form, we requested that the company, which would be responsive  
20 to the subpoena, supply the underlying document that he or  
21 whoever created this document relied on.

22 What they gave us was half of the information. They  
23 gave us gross sales data, and those are contained on -- they're  
24 called usage forms that show a price. It's one figure. And  
25 there are a lot of those usage forms. There's a great volume

1 of them. But you cannot find both gross sales and net sales  
2 from one figure. It's just impossible. And so I don't think  
3 there's any question that Spinefrontier has not fully complied  
4 with the validly issued subpoena.

5 And the last point that I would say here, just to  
6 reiterate what we said in our brief, prior counsel for the  
7 company had told us that he was prepared to produce this  
8 material, had it available in a QuickBooks data file or  
9 something similar to a QuickBooks data file, and so we know  
10 that the data exists. We know that whoever created the summary  
11 chart had to consult something. We don't think the summary  
12 chart was inaccurate. We're just trying to address the  
13 evidentiary issue or the privilege issue or whatever else might  
14 arise from the fact that there's a summary chart containing  
15 this information.

16 To the extent that the sort of procedural issues stand  
17 in the way, we've suggested to them, to the company, that we  
18 would be content to accept a stipulation saying that that  
19 summary chart is admissible evidence and then nobody needs to  
20 produce anything further. They've already produced that chart  
21 to us, and that would fully resolve this issue.

22 We're really looking to be practical on this. The  
23 subpoena has been outstanding for quite some time. Your Honor  
24 is quite right about that. We have been seeking compliance  
25 with the subpoena for quite some time. And that has not always

1 been with current counsel, that's true. I made this point in  
2 our opposition. But we have sought this -- we, the government,  
3 have sought this information from a variety of SpineFrontier  
4 lawyers numerous times. We set that out in the briefing.

5 So I think I'll leave it there, unless Your Honor has  
6 any further questions.

7 THE COURT: No. Thank you.

8 And to the defense, what about just stipulating to the  
9 chart that your client previously provided? What's the problem  
10 with that?

11 MR. POLLACK: We're not in the position to do that at  
12 this time, Your Honor. What I will say is that there was a  
13 production in January 2022 of 31 thousand-plus pages by  
14 Attorney Weinreb and then nothing again on this issue until the  
15 letter that we received. And we've confirmed with Mr. Weinreb,  
16 and I think he would describe things quite differently than  
17 Mr. Derusha. There are factual questions here. I think that  
18 their burden is to show more than just a valid subpoena and a  
19 lack of a response when enforcing -- trying to enforce a  
20 nonself-executing subpoena. They haven't made remotely a  
21 showing of contumacy or what courts would say is required.

22 And they've tried to do it. I think they've said,  
23 look, we can file another proceeding. Well, they might be able  
24 to. And if they do that, people will address it as they file  
25 another proceeding.

1           But, Your Honor, the Federal Rules of Criminal  
2 Procedure apply in this court, in this case for the benefit of  
3 all the parties, including the defendants, and the Federal  
4 Rules of Criminal Procedure instruct this Court in Rule 17 how  
5 to handle subpoenas. It does not leave open the possibility  
6 of, well, you know, you can go to any court. Does that mean  
7 they can go to a small claims court and have a small claims  
8 court enforce the subpoena? I don't think so. I don't think  
9 any court in the statute means that Your Honor has to ignore  
10 the Federal Rules of Criminal Procedure in a criminal case and  
11 be the first court in this country to accept the invitation to  
12 enforce a three-and-a-half-year-old-plus subpoena served  
13 contrary to Department of Justice guidelines -- not served.  
14 I'm sorry. The attempt to enforce it because the position  
15 Mr. Derusha has taken is contrary to the language we cite from  
16 the Department of Justice guidelines about not -- not trying to  
17 enforce it against. It doesn't say you can't --

18           THE COURT: Sorry. You lost me.

19           MR. POLLACK: We cite to the Department of Justice  
20 guidelines on --

21           THE COURT: Okay.

22           MR. POLLACK: -- I had the page. U.S. page 6, right?  
23 Next to 9-44 to 2025. "After indictment has been issued,  
24 authorized investigative demands may continue to be used in  
25 furtherance of an ongoing investigation provided they are not

1 directed to a defendant." So they're even -- I know that those  
2 are not binding and courts will often say they're not binding.  
3 But I'm not going to let somebody do something odd that there's  
4 no authority for that's contrary to the Department of Justice  
5 guidelines and then finds no home or basis in Rule 17 or other  
6 rule under the Federal Rules of Criminal Procedure. And  
7 despite the word "any court," each court, whether a criminal  
8 court or some other limited court of certain jurisdiction needs  
9 to apply its procedural rules, and they do not include  
10 overriding the Department of Justice guidelines here to find  
11 some home in Rule 11 and 17.

12 And we do take issue, and there would be factual  
13 issues about what was produced and whether it's sufficient.  
14 Mr. Weinreb would be willing to, I think -- we can provide more  
15 information about that. But this just seems like taking a  
16 stale subpoena.

17 Mr. Callahan was present when Your Honor asked if  
18 there was anything else that needed to be -- I think it was  
19 June 28th we had the hearing. We had our motion. We  
20 disclosed. We said what we were putting together. We came  
21 forward with it, and then they raised this issue for the first  
22 time two or three weeks later. I did want to end that there,  
23 unless Your Honor has questions about that.

24 But I did have one comment because there was something  
25 the government said on the last issue that I want to make sure

1 there's nothing in the record that misstates our position.

2 We're not looking --

3 THE COURT: If I could just ask a question about what  
4 you said before, before you say something else.

5 MR. POLLACK: Sure.

6 THE COURT: So you said Mr. Weinreb would be willing  
7 to answer questions about what?

8 MR. POLLACK: No. I said. Okay. Mr. Weinreb --  
9 we've consulted with Mr. Weinreb about what took place, and he  
10 would say there was no request made of him, I believe. That's  
11 what we confirmed after the production of 31 thousand-plus  
12 pages, and he understood it was done, right? And that based on  
13 the discussions he had had, this issue was resolved, as we  
14 understand it, and that would be January --

15 THE COURT: So you are saying that the materials that  
16 the government is seeking are in those 31 thousand pages; is  
17 that what you are --

18 MR. POLLACK: I have not reviewed those 31  
19 thousand-plus pages.

20 THE COURT: So did you talk to Mr. Weinreb, and he  
21 said he thought the issue was resolved; and did you understand  
22 that to mean that the information the government seeks is in  
23 the 31 thousand pages that he turned over?

24 MR. POLLACK: The way the government frames it now at  
25 this hearing, I'm not sure --

1 THE COURT: No, no.

2 MR. POLLACK: -- but at the time I understood --

20 (Parties talk over one another.)

21 THE COURT: Okay. So what was the last point you  
22 wanted to make?

23 MR. POLLACK: So where the issue went on what would  
24 constitute *Brady* as a result of the overlapping or joint  
25 investigation, it's not just the internal communications. I've

1 looked back, and maybe there's a sentence in there that  
2 suggests otherwise, but categorically, we were looking for more  
3 information about how they interact and the nature of it, not a  
4 communication-by-communication log or description. So we  
5 wanted -- I think when Your Honor looks at the *Bases* case and  
6 *Mahaffy* and those on 16 and 17, you'll see the kind of  
7 information that just helps frame this. But what's missing is  
8 separate and related to the communications with each other, the  
9 communications with the witnesses and their lawyers. What I'm  
10 hearing from the government when Your Honor asked them if they  
11 searched things, it kept sounding to me like the answer was we  
12 do what we do in every case, and it wasn't a yes. And I do  
13 think they have to look at all of their communications. I  
14 guess the right time we issued subpoenas for communications --

15 THE COURT: So from receiving exculpatory evidence  
16 from the government in many cases that I get -- I would get  
17 emails from agents to prosecutors talking about something a  
18 witness had said, and if it differed in any way from some other  
19 thing the witness had said, that would get turned over. And  
20 sometimes it gets turned over right on the eve of trial because  
21 they're emailing in trial preparation and that type of thing.  
22 So my understanding is the government does review those kind of  
23 emails and communications, and if they're communicating  
24 directly with a witness and not through their lawyer, which I  
25 think would be kind of unusual but not unheard of, but anyway,

1 I'm assuming that they've done that.

2 MR. POLLACK: But I didn't hear him say that. I think  
3 their communications with counsel during the charged conspiracy  
4 period is --

5 THE COURT: You're talking about counsel for the  
6 witnesses and people they were investigating?

7 MR. POLLACK: Well, I'm making a similar assumption I  
8 think Your Honor made, that once someone is represented, the  
9 lawyers are probably not communicating with the witness,  
10 they're probably communicating with the witness's counsel, and  
11 maybe the agents are communicating with the witnesses. But as  
12 I said, the presence of counsel for each of these people  
13 becomes critical to us defending that at certain portions of a  
14 charged conspiracy period couldn't have been conspiring. It's  
15 a lawyer all over it for them, and the government is even  
16 interacting with them.

17 I don't think the government has said that it has  
18 looked at all of its communications with lawyers for witnesses  
19 or witnesses themselves and turned those over. And to the  
20 extent that there are lawyers involved, that by itself is  
21 *Brady*. And the more lawyers involved, the less likely they  
22 could prove that we are conspiring with a witness who's  
23 surrounded by counsel who's communicating with the government,  
24 and I think we get to see what those communications look like,  
25 particularly during the charged conspiracy period. We have to

1 defend it. How could we conspire with -- they gave one name of  
2 one of the several surgeons, but with that person in the weeks  
3 and months that he's represented by counsel communicating with  
4 the government, we get to see they're not just saying hello. I  
5 don't think we're just stuck in the final agreements. In this  
6 case where there are communications and drafts during the  
7 charged conspiracy period, drafts of agreements with these  
8 people going back and forth with lawyers during the charged  
9 conspiracy period, I can't see how that's not the epitome of  
10 *Brady*. And they have not said that they looked at that.

11 What they said was they turned over final agreements,  
12 not the underlying communications that would show counsel all  
13 over events during the charged conspiracy period, not drafts of  
14 them that would show the evolution of how some of these  
15 surgeons turned from people who said that they performed to  
16 people who didn't perform. And I think where it goes to the  
17 culpability of the potential co-conspirators, that's just  
18 *Brady*.

19 So that's where I'll leave it, Your Honor. I know  
20 I've gone on, but it was said that we were just looking for the  
21 internals. Yes, I think where there is an internal that says  
22 I've communicated with that lawyer, here's what I told them,  
23 we'd get that, too, because I think they were coordinating  
24 things like that. But I don't want to lose sight of the fact  
25 that they haven't done the fundamental task of looking at their

1 own communications and their agents' communications with  
2 counsel where it shows the presence of counsel during the  
3 conspiracy period.

4 THE COURT: Where it shows the presence of counsel for  
5 other people they're investigating during the period.

6 MR. POLLACK: This is the oddity that they didn't just  
7 investigate after the charged period. They investigated --  
8 we're charged with -- I think you can read the charges that say  
9 we're charged with conspiring with Montone, and -- I'm  
10 forgetting the other name -- Carlson, who they mentioned, and  
11 others, and they're communicating with counsel affecting the  
12 events during the charged conspiracy period. At times someone  
13 becomes -- eventually someone who is doing what the government  
14 instructs and then they can't be conspiring with us, for  
15 instance. We get to see that.

16 And when counsel is present -- I mean, a jury could  
17 find we're not guilty for various reasons early on until some  
18 knowledge accumulates, but then at that later point, perhaps  
19 when the knowledge has accumulated of something, lawyers are  
20 already involved, and those people can't qualify as  
21 co-conspirators because all they're doing is what the  
22 government is asking or they're trying to work with the  
23 government. And besides which, lawyers are present, and we all  
24 know that is a theory of defense is it couldn't have been  
25 fraud, there are lawyers all around it. I know it might work,

1 it might not. It doesn't have to rise to the level of reliance  
2 on counsel, but lawyers being present and no lawyer raising a  
3 hand saying this is wrong, can be a theory of defense. So the  
4 fact that not only we have lawyers but these surgeons had  
5 lawyers and they're involved, well, during that period when  
6 they had lawyers, how can we be conspiring. The lawyers aren't  
7 saying don't talk to them, don't do this.

8 So I think they're just ignoring those types of areas  
9 beyond just the more complicated internal communications, which  
10 I still think they have to look at. And it might be that  
11 looking at their communications with these lawyers for  
12 witnesses would then inform a narrower way to go about looking  
13 for how they communicated internally about what they were doing  
14 with witnesses who are alleged co-conspirators during the  
15 alleged conspiracy period because that is really unusual here.

16 I have to admit that I've been involved in a lot of  
17 cases, and I haven't had the government so involved with so  
18 many alleged co-conspirators for a year and a half or more  
19 during the charged period. That's just an oddity. It happens  
20 sometimes at the tail end. It's limited. It's isolated. Here  
21 it just permeates more than a year and a half or two years of  
22 the charged period, and we have to defend that, Your Honor.

23 THE COURT: Okay.

24 MR. DERUSHA: Your Honor, I'm sorry.

25 THE COURT: Go ahead.

1                   MR. DERUSHA: Just on the government's motion to  
2 compel, I won't go back on the motion from the defendants. I  
3 think you understand our position on that, that we have not  
4 excluded anything on account of the fact that there was a joint  
5 civil investigation. But on the government's motion to compel,  
6 I just wanted to address briefly what counsel said about  
7 Mr. Weinreb's involvement.

8                   Just to clarify the time line, Mr. Weinreb was counsel  
9 to SpineFrontier after the indictment, provided documents in  
10 response to our request after the indictment. It was a high  
11 volume of material. It took us some time to look through those  
12 materials.

13                   I'm not aware of a single page in those 31 thousand  
14 pages that they're referring to that contained a second figure,  
15 net sales. If that data exists, we would be happy to be  
16 directed to it. We've asked the defendant, we've asked  
17 SpineFrontier to direct us to that if it exists. It does not  
18 exist, or at least if it does, nobody before Your Honor right  
19 now is aware of it.

20                   And so we asked for the request to be met and for that  
21 data to be provided. And I don't think Mr. Weinreb would say  
22 anything different. But ultimately the issue comes back to  
23 whether or not the company has complied with the subpoena. The  
24 subpoena was validly issued when it went out, and the company  
25 has not fully responded to it, and I think that's all it comes

1 down to.

2 THE COURT: Okay. All right. So I'm taking this all  
3 under advisement, and I appreciate everyone's fortitude this  
4 afternoon.

5 Thank you very much.

6 And I'll try to move on this as quickly as I can.

7 Thank you.

8 (Recording ends.)

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1 CERTIFICATE OF OFFICIAL REPORTER  
23 I, Linda Walsh, Registered Professional Reporter  
4 and Certified Realtime Reporter, in and for the United States  
5 District Court for the District of Massachusetts, do hereby  
6 certify that the foregoing transcript is a true and correct  
7 transcript of the audio-recorded proceedings held in  
8 the above-entitled matter, to the best of my skill and ability.

9 Dated this 16th day of September, 2023.

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13 /s/ Linda Walsh  
14 Linda Walsh, RPR, CRR  
15 Official Court Reporter  
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